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No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1948

AUGUST KLAPPROTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO MODIFY JUDGMENT

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MOTION TO MODIFY JUDGMENT

Respondent respectfully moves this Court to modify its judgment in this cause so as to permit respondent to contest the facts alleged in the petition to vacate the default judgment, for the following reasons:

In this case the District Court sustained the Government's challenge to its authority to grant the relief requested in Klapprott's petition to vacate the default judgment (R. 17). The Government's position was that the allegations of the petition were insufficient on their face to show that he was entitled to the relief sought. On appeal, the Court of Appeals and this Court prop-

erly considered the case on the hypothesis that the allegations of Klapprott's petition were true. This Court has now held that the petition does adequately state a cause of action, and we are not asking reconsideration of that decision.

But we have always assumed that the overruling of a motion to dismiss or demurrer, whether by the trial or appellate court, does not warrant the entry of a judgment for the party plaintiff upon the basis merely of the allegations of his pleading. The status of the case then is that the defending party (the Government, on this petition to vacate) has an opportunity to contest the factual allegations of the plaintiff in the trial court. We know of no procedure by which a judgment for the plaintiff can be entered merely upon the denial of his adversary's motion to dismiss.

The record before this Court contains only a brief reference in the District Court's opinion to the Government's position as a challenge to "the authority of the Court to grant relief at this time" (R. 17). But the typewritten transcript of the argument before the District Court shows definitely that counsel for petitioner, Assistant United States Attorney Ryan, and the court all assumed—and indeed stated—that they were dealing preliminarily with the question of the court's jurisdiction, and that if the Court did not dismiss the petition for lack of jurisdiction,

the parties would have a chance to submit evidence by way of affidavit, deposition, or otherwise.

Counsel for petitioner, in his opening, stated (Tr. 2):

> Mr. Ryan indicated to me the other day that he had intended to apply or make an application to have the petition and order to show cause dismissed for lack of jurisdiction, and that is why we suggested that Mr. Ryan proceed with his application.

Tr. 7:

> Now, if the Court please, as I started to say before, prior to the return day of the order to show cause I communicated with Mr. Ryan for the purpose of obtaining a stipulation under Rule 29 for the taking of depositions. When I spoke with Mr. Ryan about questions of fact I asked him whether he intended to file affidavits and rely upon them because I said if he hadn't or didn't I would want to take depositions under the rule. Mr. Ryan then told me that he had no affidavits prepared and that he didn't propose to bring any with him this morning but that he intended to make an application on the merits, on the question of law, rather, as to jurisdiction. For that reason Mr. Ryan, according to our understanding, was to proceed with his motion.

He indicated to me, or said to me that if the matter was not decided on the jurisdic-

tional question he would make application for further time in which to file affidavits.[1]

Tr. 8:

. . . in view of our understanding of the other day I don't care to proceed this morning on these affidavits, it is my intention, and was, to have depositions taken under the rule so that witnesses could be sworn and examined, so that the Court would have the full story before it, all of the facts upon which to determine, particularly when matters of judicial discretion arise.

Now, *I therefore say that if Mr. Ryan wishes to proceed with his application under the law, and then if it is not granted to ask for time on the question of facts, I will be very happy to go along with it because that was our agreement.*

Tr. 11-12:

. . . we are not ready this morning to argue that point in view of the understanding I have had with Mr. Ryan, because that is a matter which would be addressed to the Court's discretion, I'd say. And in that case your Honor must have all of the facts before you. This petition and affidavit was merely for the purpose of obtaining the order to show cause and it loses its efficacy on the return day. We must proceed under Rule 29 or 30 to take depositions so that the entire facts are before the Court, the witness' own statements, with a right to cross-examine.

[1] All italics supplied.

The District Court subsequently stated (Tr. 13–14):

> Now, regardless of depositions, affidavits or otherwise, the initial question which the Court must answer is whether or not under any circumstances, and regarding the facts most favorably to the petitioner, the Court has any jurisdiction at all to vacate the original judgment.
>
> *Now, depositions aren't needed if the Court decides that as a matter of law,* and regardless of what prompted the neglect, excusable or inexcusable, and regardless of what it was, *the Court has no jurisdiction* to open and vacate a judgment entered four and a half years ago. That is a question of law.
>
> Now, I don't know why we have to go through the cumbersome procedure of taking depositions and why Mr. Ryan should be required to furnish affidavits.
>
> Mr. SEMEL. May I answer that?
>
> The COURT. Yes.
>
> Mr. SEMEL. Well, that is exactly what I assumed we were ready to argue.

Tr. 19:

> The COURT. But he can have his day in my court only upon proof that the Court has jurisdiction, which is the first hurdle that this petitioner must meet at this stage of the proceeding. And I say the six months period having elapsed it doesn't resolve itself into a question of fact, in my judgment, which may be wrong,

I have been wrong many times, it is purely a question of law.

Tr. 22:

Now, I think we have got to meet the question of law first and regardless of any depositions or affidavits or anything else, the question of law is a simple one, at least it is a narrow one, it may not be simple but at least it is narrow: Does this Court have jurisdiction after the lapse of four and a half years, no action having been taken by the petitioner in the meantime, or the defendant in the original suit, to open and vacate that judgment?

The Assistant United States Attorney then stated (Tr. 22):

In the first place, I would like to state that I made no arrangement with Mr. Semel. Mr. Semel called me and told me that he thought he might like to have a postponement, to which I did not consent and for which I had no authority.

At that point he asked me about the opposition which would be made and I frankly told him that I conceded primarily *the first question* was a jurisdictional one, and I, I, thought good enough to tell him what our position would be so he might prepare himself somewhat.

Tr. 23:

* * * the question is, as your Honor has so well stated, does this Court have jurisdiction?

The Assistant United States Attorney then proceeded to give an example of a factual allegation which he believed to be false and would contest on the merits if necessary, but he was not permitted to elaborate because, in the words of petitioner's counsel, "this argument was confined to the jurisdictional question" (Tr. 25).

Tr. 24–25:

> Now, reviewing a petition which has been filed here by the defendant, he charges primarily that, first, when he was served he was too ill to answer. Well, shortly after the defendant was served, which was on May 15; there was a Grand Jury proceeding in Hartford, Connecticut, I believe it was, at which his presence was required and he was served by subpoena and he demurred and said he was too ill to attend, that he previously had had a case of ulcers. At that time there was an examination by his own physician of the defendant and he was pronounced well enough to attend; and he did attend in Connecticut.
>
> Mr. SEMEL. May I interpose an objection here? Mr. Ryan is arguing a question of fact, he has nothing upon which to base his argument. I thought this argument was confined to the jurisdictional question.
>
> The COURT. I think primarily it is one of jurisdiction in the first place. I don't think we have to go into the merits of his affidavit.

Tr. 28:

> Mr. RYAN. I just wish to say to the Court and counsel my reference to the application was not for the purpose here of saying something which I have no proof of, either by way of affidavit or deposition, but to assure both the Court and counsel that if the petitioner should get over the jurisdictional hurdle and get into the merits of his application, as your Honor said he would have to show, that there is reasonable cause to conclude that if he had then presented the facts to the Court there would have been a different result. *My purpose was merely to assure the Court and counsel that on the merits we are prepared to meet the allegations of the defendant.*

The Court indicated plainly that if the petitioner satisfied the Court on the matter of jurisdiction, it would proceed to the merits of the application and take evidence.

Tr. 27–28:

> The COURT. But we don't have to meet that, we don't have to meet that but we must meet before we can proceed further the question of jurisdiction because regardless of any other question the Court cannot act, even if this were fraudulently procured, the Court cannot act unless it meets the jurisdictional requirements. This is a court of limited jurisdiction. Of course not limited authority in that re-

spect, broad authority but limited jurisdiction and we can proceed only when the law permits us and in a manner in which the law permits us. And this petitioner in my judgment to succeed in this application has got to bring himself within the rule that I have read to satisfy this Court that as a matter of law the rule has no application. *If you succeed in that we can then proceed to the merits.*

Mr. SEMEL: *That is true.*

The COURT. *But until you succeed in proving to the Court how the rule does not apply we cannot proceed to the merits, and I am not interested in any affidavits except that of the plaintiff.*

In the Court of Appeals the Government stated in its brief that since "the sole issue upon which appellant's petition was dismissed in the District Court was the jurisdictional question raised by the Government * * * if the dismissal should be reversed on appeal, it would require an order remanding the matter to the District Court for consideration of the merits of appellant's petition, rather than a vacation of the judgment of July 21, 1942, by which appellant's citizenship was revoked." And in this Court the Government reiterated that except for purposes of testing the sufficiency of petitioner's allegations, "the Government does not admit the truth of the facts averred by petitioner (except those of record) and assumes that the proceeding would

be remanded for trial if this Court were of the view that the petition set forth a cause of action" (Br. p. 6).

If the customary practice is followed—as both parties assumed it would be—whereby a contest of factual allegations is permitted after jurisdictional objections have been overruled, this proceeding would be remanded to the district court with opportunity to the Government to meet Klapprott's allegations. But this Court's judgment orders the case remanded to the district court "with instructions to set aside the judgment by default and grant the petitioner a hearing on the merits raised by the denaturalization complaint." This deprives the Government of the opportunity to which it is entitled under accepted principles of procedure to challenge the allegations of the petition.

If this Court had held as a matter of law, apart from the particular facts alleged, that the default judgment was void for failure to hold a hearing, there would be no purpose in a remand for proof of petitioner's allegations. But Mr. Justice Burton's concurrence rests "on the special circumstances here shown on behalf of this petitioner", and this would seem to refer to the whole body of facts set forth in the petition, and not merely to the formal facts of record and to the undeniable fact of imprisonment. But the facts set forth in the petition have not been shown

to be true; they have merely been alleged.[2] Except for purposes of testing the sufficiency of the petition, they have not been admitted by the Government's challenge to the authority of the district court to grant the relief sought, which was in the nature of a demurrer. The Government should not be held to have forfeited its chance to defend against the petition to vacate because the United States Attorney—not unreasonably, since six out of thirteen judges have agreed with him—thought the petition insufficient on its face and challenged it only on that ground in the first instance.

We have reason to believe that there may be additional facts, which were not in the record and hence could not be mentioned in this Court, which might have a substantial bearing on the verity of petitioner's allegations purporting to show that he was prevented from contesting the denaturalization complaint. This Court should not assume petitioner's veracity as a matter of law. Only if this Court's judgment permits a trial of the allegations of the petition to vacate can these matters be explored. We are, of course, not suggesting this modification of the judgment for dilatory reasons or merely to harass petitioner, although we believe that the Government

[2] Petitioner's counsel conceded that the affidavit attached to the petition "was merely for the purpose of obtaining the order to show cause and it loses its efficacy on the return day." (Tr. 12).

is entitled as a matter of law to a chance to contest the allegations of the petition.

In the absence of a holding that the default judgment must be vacated irrespective of the circumstances alleged in the petition to vacate that judgment, we submit that trial of the denaturalization complaint, as presently ordered, is premature, until petitioner establishes (either by the Government's failure to deny his allegations or by proof of them) the "special circumstances" referred to by Mr. Justice Burton. If these circumstances are not established as facts, petitioner is not entitled to have the default judgment vacated. And not until the "special circumstances" which would warrant the vacating of the default are established by some orderly legal process is petitioner entitled to trial of the original denaturalization suit. See the dissenting opinion of Mr. Justice Frankfurter.

We therefore respectfully pray that the judgment of this Court be modified so as to remand the case to the District Court for further proceedings consistent with the view that the petition to vacate the default on its face states a basis for relief, and that there be deleted from the judgment the present instruction to set aside the default judgment and hold a hearing on the merits raised by the denaturalization complaint.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

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